Supreme Court, U. S.
FILED
AUG 30 1980
MICHAEL RODAK, JR., CLERK

80-327

No.

IN THE

Supreme Court of the United States

October Term, 1980

VALLEY FORGE CHRISTIAN COLLEGE,
Petitioner,

and

THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, THE UNITED STATES OF AMERICA

v.

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC., ANDREW LEIGH GUNN, EDWARD E. DOERR, GIOELE SETTEMBRINI, and E. MALLARY BINNS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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QUESTIONS PRESENTED

1. If pursuant to Act of Congress the federal government transfers to a church-related college personal and real property which is "surplus" to governmental requirements, will a citizen-separationist or any citizen, *without* taxpayer status, have standing to challenge the transfer as action which violates the Establishment Clause?

2. Does the alleged violation of a citizen's right ". . . to a Government that does not establish religion",[1] satisfy the injury in fact requirement of standing, where the citizen fails to meet the criteria for taxpayer standing mandated by this Court in *Flast v. Cohen*, 392 U. S. 83 (1968)?[2]

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1. *Americans United for Separation of Church and State, et al. v. United States Department of Health, Education and Welfare, et al.*, 619 F. 2d 252, 254 (3d Cir. 1980) (A. 1).

2. The caption of this case identifies the names of all parties to the proceeding in the United States Court of Appeals for the Third Circuit.

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OPINIONS

The December 15, 1978 order of the District Court granting Petitioner's motion for summary judgment is unreported. (A42)

The three opinions of the United States Court of Appeals for the Third Circuit (majority opinion by Adams, J., concurring opinion by Rosenn, J., dissenting opinion by Weis, J.) are reported as: *Americans United for Separation of Church and State, Inc., et al. v. United States Department of Health, Education and Welfare, et al.* at 619 F. 2d 252 (3d Cir. 1980) (A1)

JURISDICTION

On April 8, 1980, the United States Court of Appeals for the Third Circuit rendered the judgment which petitioner seeks to have reviewed. On June 3, 1980, that Court denied petitioner's petition for rehearing *en banc*. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U. S. Const. Art. I, § 8, Cl. 1 A49
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Federal Property and Administrative Services Act of 1949, 40 U. S. C. § 471 et seq. (1970) A50, 51

STATEMENT OF THE CASE

In 1973, the Secretary of Defense ordered the closing of a military hospital near Valley Forge, Pennsylvania, having declared the facility "excess" to the requirements of all military branches of the Defense Department. Thereafter, the property was reported as "excess" to the General Services Administration ("GSA") which offered the facility to all other federal government agencies in accordance with the procedures prescribed by the Federal Property and Administrative Services Act of 1949 ("Federal Property Act").[3] No other agency indicated a need for the facility whereupon GSA declared the property "surplus"[4] to the requirements of the federal government. The hospital property was assigned to the Department of Health, Education and Welfare ("HEW") for disposal to either a health or an educational institution in accordance with procedures prescribed by the Federal Property Act.[5]

Several health or educational institutions, some public, others private applied to become transferees of portions of the tract. Following extensive studies done by local and federal agencies of the merits of these applicants, the Petitioner, Valley Forge Christian College, was selected to receive a portion of the real estate and some personal property formerly utilized by the military hospital. Petitioner, which is affiliated with the Assemblies of God Church, had been conducting its educational activity at a facility it had outgrown.

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3. 40 U. S. C. § 471 *et seq.* (1970) (A. 50).

4. "Surplus" is defined in regulations promulgated under the Federal Property Act and ". . . when used with respect to real property means any excess real property not required for the needs and the discharge and the responsibilities of all Federal Agencies as determined by the Administrator or his designee." 45 CFR Part 12.

5. 40 U. S. C. § 484(k)(1) (A. 50).

In accordance with the Federal Property Act,[6] HEW granted Petitioner a "public benefit allowance" pursuant to which it must earn the right to use the property over a period of thirty years through a bestowal of public benefits in conducting its educational program.

In August, 1976, HEW conveyed a portion[7] of the hospital property to Petitioner. Subsequently, Petitioner relocated its campus to the property and rehabilitated the facility at substantial cost. For the last four years, Petitioner has continuously occupied and maintained the facility as a college.

This action was instituted against the Petitioner by the filing of an amended complaint on July 12, 1977.[8] The Respondents and plaintiffs in the District Court are Americans United for Separation of Church and State, Inc., a non-profit corporation, and four individuals who are employed by the organization. Jurisdiction of the District Court is founded upon 28 U. S. C. § 1331, since the Respondents alleged that their claim arose under the First Amendment.

The amended complaint challenged HEW's transfer of the property on allegations that Petitioner's sectarian[9]

6. 40 U. S. C. § 484(k)(1)(C) (A. 51).

7. Petitioner received approximately 77 acres with buildings from a tract consisting of approximately 180 acres which had been utilized by the military hospital until its closure three years before.

8. The complaint was originally filed in the United States District Court for the District of Columbia naming as a defendant only HEW. It was transferred, apparently with the agreement of Respondents and HEW, to the United States District Court for the Eastern District of Pennsylvania on March 24, 1977. An amended complaint filed July 12, 1977 named Petitioner as a co-defendant with HEW.

9. Judge Adams wrote: "The Valley Forge Christian College is admittedly sectarian." *Americans United, supra,* at 253 (A. 3). The "admission" to which the Court refers is certainly not one of

character disqualified it under the Establishment Clause as a transferee of government property. Respondent sought a declaration that the transfer violated the First Amendment, that the transaction be rescinded, that HEW be enjoined from making the transfer and that Respondents be awarded their attorneys' fees and costs. (Amended Complaint)

Following the completion of discovery,[10] HEW moved to dismiss the complaint and Petitioner moved for summary judgment. Both motions sought dismissal of the action on the grounds that Respondents lacked standing to sue. The District Court, in an unreported order dated December 15, 1978 (A. 42), granted the parties' motions and dismissed the complaint.

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9. (Cont'd.)

the Petitioners. Since the complaint was dismissed prior to a trial on the merits, the question of whether or not this institution would or would not qualify under the First Amendment to be a transferee of surplus property has never been litigated. For a college to be "sectarian" or "church-related" is hardly co-extensive with "religion" as used in the Establishment Clause. See *Roemer v. Board of Public Works of Maryland*, 426 U. S. 736 (1976); *Hunt v. McNair*, 413 U. S. 734 (1973); *Tilton v. Richardson*, 403 U. S. 672 (1971).

10. Respondents' interrogatories to HEW and to Petitioner were answered. Petitioner's interrogatories and requests for production of documents addressed to Respondents were answered. Petitioner took the depositions of the individual Respondents, Andrew Leigh Gunn, Edward E. Doerr, Giole Settembrini and E. Mallory Binns. The depositions were transcribed and filed. Affidavits of Lois M. Sparklin, an employee of HEW, William J. Sheehan, Executive Director of the President's Economic Adjustment Committee and the Director of the Office of Economic Adjustment, Office of the Secretary of Defense; and Richard Coffman, an appraiser, were filed in connection with Petitioner's motion for summary judgment. The foregoing in addition to the pleadings constitute in the main the record before the District Court and the Court of Appeals.

Respondents appealed to the United States Court of Appeals for the Third Circuit and on April 8, 1980 that Court filed its three opinions (majority, concurring and dissent) and by vote of two to one reversed the District Court and directed that the action be remanded. On June 3, 1980, the Third Circuit denied Petitioner's petition for a rehearing *en banc*. This petition for a writ of certiorari followed.

ARGUMENT

The Majority Has Embraced a Concept of Standing Presented to the Court in 1968 and Not Accepted by It at That Time, or Since. If the Basic Principles of Standing Prove to Be Unworkable or Undesirable, Then It Is the Supreme Court and Not a Court of Appeals That Has the Right to Change Them. Weis, J. Dissenting, Americans United, 619 F. 2d 252, 271 (3d Cir. 1980). (A. 41)

A Court of Appeals has repudiated *Flast v. Cohen*,[11] formulated a unique, unheard of and unknown test authorizing citizen standing for constitutional litigation, ignored five other opinions of this Court [12] and placed itself in conflict with at least one other circuit.[13] The judgment of the Third Circuit deserves review by this Court at the behest of Petitioner, a tiny college of about 500 students [14] threatened with the loss of its campus after four years of happy occupancy. Petitioner's "wrongdoing" was to apply, with other applicants, for a piece of surplus government property under a procedure authorized by federal statute. Until this lawsuit, the Federal Property Act had never been challenged in its thirty-one year history; none of the hundreds and hundreds of

11. 392 U. S. 83 (1968).

12. *Simon v. Eastern Kentucky Welfare Rts. Org.*, 423 U. S. 26; *Warth v. Seldin*, 422 U. S. 490 (1975); *Schlesinger v. Reservists Committee to Stop the War*, 418 U. S. 208 (1974); *U. S. v Richardson*, 418 U. S. 166 (1974); *Sierra Club v. Morton*, 405 U. S. 727 (1972).

13. *American Jewish Congress v. Vance*, 575 F. 2d 939 (D. C. Cir. 1978).

14. This was the student enrollment for the academic year (1977-1978). Defendant Valley Forge Christian College Answers to Plaintiffs Interrogatories, No. 24.

surplus property transfers to health and educational institutions (including those which were church-related) had ever been questioned.

Petitioner has been fighting for its life, strangled by litigation: first, as a defendant in a case of first impression in the District Court, and now as the unwilling victim of a fundamental change in standing jurisprudence, having been ordered by the Circuit Court to proceed to a trial in the District Court *unless* this Court will intercede.

The amended complaint asserted that each of the individual Respondents were taxpayers who challenged the transfer of surplus government property as violative of the Establishment Clause. (Amended Complaint ¶¶ 3-6) This Court's heralded decision in *Flast* permitted taxpayers access to a federal court to challenge the constitutionality of a congressional exercise of the power to tax and spend provided (a) that the taxpayer could demonstrate a logical link between his taxpayer status and the type of legislative enactment challenged and (b) that he could establish a nexus between taxpayer status and the precise nature of the constitutional infringement alleged. *Flast* required that the legislation challenged be a congressional exercise of the taxing and spending power granted by Art. I, § 8 of the Constitution. *Flast* and subsequent opinions of this Court have explained that the taxpayer can demonstrate the existence of a logical connection between taxpayer status and the constitutional provision assailed only by statutes whose constitutional source was the taxing and spending power of Art. I, § 8. The Federal Property Act challenged by these Respondents is the exercise of the power granted to Congress under Art. IV, § 3, Cl. 2, referred to as the "Property Clause." (A. 49) That clause authorizes Congress to pass appropriate legislation respecting the disposition of federal property. The Federal Property Act of 1949 is

undeniably a congressional exercise of its power granted under the property clause and *not* of its taxing and spending power. *Van Brocklin v. Tennessee,* 117 U. S. 151 (1886); *Ashwander v. T. V. A.,* 297 U. S. 288 (1936); *Alabama v. Texas,* 347 U. S. 272 (1954) and *Kleppe v. New Mexico,* 426 U. S. 529 (1976).

This Court has consistently applied *Flast* in denying prospective plaintiffs the right to utilize the federal courts to complain about congressional action whose power source is not the taxing and spending clause. See, *U. S. v. Richardson,* 418 U. S. 166 (1974) (standing denied because legislation in question was enacted pursuant to Art. I, § 9, Cl. 7) and *Schlesinger v. Reservists Committee to Stop the War,* 418 U. S. 208 (1974) (standing denied where the taxpayer's challenge was to action under the "Incompatibility Clause" of Art. I, § 6, Cl. 2); see also, *Frothingham v. Mellon,* 262 U. S. 447 (1923) (denying standing to a taxpayer challenging legislation empowered by the Fifth and Tenth Amendments). In fidelity to these precepts, the District Court dismissed the complaint.

The Court of Appeals agreeing that the Respondents failed the *Flast* criteria and hence lacked taxpayers' standing,[15] nevertheless reversed, holding ". . . the Establishment Clause creates in each citizen a 'personal constitutional right' to a Government that does not establish religion." *Americans United, supra* at 265. (A. 29) In so doing, Judge Adams observed that this case presented the Court below with the opportunity to answer:

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15. The majority wrote:

We do not dispute the district court's determination that under the law as it presently exists, individuals asserting *solely* their interest as taxpayers have standing to challenge only exercises of the taxing and spending power, and not actions authorized by other constitutional provisions. *Americans United, supra,* 260 (A. 18).

> . . . the novel and important question posed by Justice Fortas in *Flast* which the Court did not reach and thus did not decide: whether the vital interest of a citizen in the establishment issue, without reference to his taxpayer's status, would be acceptable as a basis for [standing to bring] this [kind of] challenge. *Americans United, supra* at 262. (A. 21-22)

The Court of Appeals' response to this question is remarkable:

> "An allegation of injury in fact to an interest protected by the Establishment Clause is *all* that is required for standing." (Emphasis supplied) *Americans United, supra* at 265. (A. 28)

To the complex literature of standing, already overburdened with formulae and criteria, the Circuit Court has added the concept that plaintiffs' "shared individuated [16] right" in a government that does not establish religion is the "direct" or "concrete" injury required by a plaintiff who seeks to deploy the federal judicial machinery. This phraseology, alien to the language of standing, does not overcome this Court's refusal to recognize standing for a plaintiff whose injury is no more than "abstract injury in non-observance of the Constitution asserted by [plaintiffs] as citizens." *Schlesinger, supra* at 223, n. 13. As will be seen, these Respondents are ideological plaintiffs, "separationists", *Americans United, supra* at 261 (A. 18) who are unaffected and unharmed by the transfer, but who

16. The majority opinion defines "individuated" in this fashion: To be individuated, 'an interest need only be expressible in terms of the individual litigants' concrete satisfaction or experiences; but such saitfsactions or experiences need not be *unique* to the litigant' (quoting L. Tribe, American Constitutional Law § 319, at 85 (1978) *Americans United, supra* 259 (A. 14).

seek to engage in "forensic" litigation; they do not invoke the judicial process for the healing of injury. If Respondents have standing, then the Third Circuit's opinion has guaranteed to every citizen the right to a federal forum to debate his grievances with government.

For this Court to follow the majority's lengthy journey to repudiate *Flast* and ultimately recognize citizen standing demands a consideration and acceptance of several subsidiary premises:

First, that the *Flast* Court was limited by the pleadings: had the *Flast* plaintiffs alleged something more than their taxpayer status, this Court would have held in *Flast* ". . . that the Establishment Clause does create in every citizen a personal constitutional right, such that any citizen, including taxpayers, may contest under that clause the constitutionality of federal expenditures." *Americans United, supra* at 262. (A. 21)

Secondly, the Court must appreciate that while these Respondents pleaded only their taxpayer status, actually their "essential contention", *Americans United, supra* 234 (A. 4) is that government conduct injured them offering this Court the opportunity that it did not have in *Flast* to change the law.

Finally, this Court must agree that the ideology of an absolute separatist position distinguishes these Respondents from the rest of the American citizenry and warrants standing, or alternatively, independent of their separatist goals, these plaintiffs as citizens have standing to sue under the Establishment Clause, even though they have not achieved taxpayer status.

Flast Revisited and Retreaded

The Court of Appeals agreed with the District Court that Respondents lacked taxpayer standing but said that the District Court erred in misperceiving" . . . the legal

identity assumed by the [Respondents] in this case." *Americans United, supra* at 254. (A. 4) "the heart of [Respondents'] complaint is that the challenged governmental action caused 'injury in fact' to their shared individuated right to a government that . . ." does not violate the First Amendment. If the heart of the complaint be located within its four corners, then it beats strongly over injury to the individual Respondents as *taxpayers;* the murmur of injury to a "shared individuated right" heard by the Court can be neither seen nor heard by any fair examination of the amended complaint.[17]

The fact that the pleadings in this case are different than the pleadings in *Flast,* says the Court below, offers it the opportunity to embrace a theory which, but for pleading inhibitions, this Court in 1968 was rendered unable to articulate.

The fallacy of this perception is that neither the amended complaint nor the record here support, nor did the record in *Flast* or the subsequent opinions of this Court indicate that apart from taxpayer status any citizen has standing.

As to the record below, the amended complaint identifies the individuals as taxpayers and the organizational plaintiff as a non-profit corporation. It is asserted that each taxpayer ". . . would be deprived of the fair and

17. As to each of the allegations respecting the plaintiffs' status, the complaint pleads: [the individual] is a citizen of the United States (Amended Complaint ¶¶ 3-6). Even the statement of the claim does not relate the injury personally to Respondents. They allege:

> the granting of property or other financial assistance to such colleges is a violation of the Establishment Clause of the First Amendment of the Constitution of the United States of America which states 'Congress shall make no law respecting the establishment of religion . . .'. (Amended Complaint, ¶ 12)

constitutional use of his (her) tax dollar for constitutional purposes in violation of his (her) rights under the First Amendment . . .". (Amended Complaint, ¶ 8) No other basis of standing is asserted. Discovery conducted both by interrogatories and depositions was unilluminating as to Respondents' supposed stake in the outcome of this litigation. Respondent Gunn, for example, said he sustained a pocketbook injury because if property was given away he would be obliged as another taxpayer to ". . . make up the difference."[18] Another, while agreeing that the future reduction of taxes would be "comparatively small", nevertheless *linked the injury* to his taxpayer status.[19]

The organizational Respondent's standing to sue is based upon the assumed status of its members as federal taxpayers and upon their personal right to redress alleged constitutional grievances. (Amended Complaint, ¶ 2) It did not claim taxpayer status; it cannot be a *Flast* plaintiff. The amended complaint may be read to suggest that the organization Respondent tenders its special interest in maintenance of the constitutional principle of church and state as a basis for its standing to sue.

This Court has held a party may have standing to assert only its own rights, and not the rights of third parties. *Arlington Hts. v. Metro Housing Corp.*, 429 U. S. 252 (1977). Only where the organization itself has been injured, may it thereafter assert the rights of its members provided that the organization's injury is the same as theirs. *Warth v. Seldin*, 422 U. S. 490 (1975); see also, *Boston Stock Exch. v. State Tax Comm.*, 429 U. S. 318 (1977). In according this organization standing, Judge Adams fails to apply the criteria which this Court announced in *Warth, supra*, which are: first, that the organization must seek judicial relief from injury to itself and second, that it must

18. Gunn Deposition at 12.

19. Doerr Deposition at 35.

at least assert the adverse effect of the challenged action on its members' associational ties. *Warth, supra* at 511. The organization satisfied neither of these criteria.

This Court's opinion in *Sierra Club v. Morton* [20] is an absolute prohibition to "special interest" organizational standing. In *Sierra Club*, this Court expressly disapproved the organizational plaintiff's historic interest in conservation and held that "mere interest in a problem" no matter how longstanding and no matter how qualified the organization, does not meet the standing test of "distinct and palpable injury" to challenge governmental action. *Sierra Club, supra* at 739. See also, *Simon v. East Kentucky Welfare Rts. Org., supra; Schlesinger, supra* at 226; *American Jewish Congress v. Vance*, 575 F. 2d 939 (D. C. Cir. 1978) (denying standing to the separationist [21] plaintiff and holding that "sheer motivation and commitment to the subject matter of a suit, no matter how strong, cannot substitute for judicially cognizable injury". *Id.* at 943.

The Court's contention that but for pleading limitations, *Flast* would have announced the principle espoused by the majority below smacks more of rationalization than it does of *ratio decidendi*. None of the opinions of the *Flast* Court complains of pleading limitations. Nothing in the majority opinion suggests a "feel" of more than a conditional willingness to open the door to taxpayer suits. The opinions of the three-judge court which decided the *Flast* case below do not support this focus. That complaint asserts taxpayer status and constitutional violation. The research of Judge Weis below, dissenting, who combed the

20. 405 U. S. 727.

21. The plaintiff in this case, the American Jewish Congress, was named by one scholar as one of the three leading separationists groups in America. The other two are the Respondent organization and the American Civil Liberties Union. Sorauf, *The Wall of Separation* (Princeton University Press 1976).

record and briefs before this Court in *Flast*, persuasively demonstrates that not only does the record *not* support the majority's version of what happened, but that the identical theory adopted by the Circuit Court here was rejected there. He concludes:

> It cannot be said, therefore, that the Supreme Court was not strongly urged to adopt the theory that the majority here now advances. *American United, supra* at 270. (A. 38)

Since *Flast*, this Court has been presented with frequent opportunities to embrace the hypothesis of the majority or to forecast in dictum that it is constitutionally viable. On each occasion this Court has convincingly reaffirmed *Flast*. See, *Schlesinger, supra*, and *Simon, supra*. Though the opinion of the Court below acknowledges the requirements that "[c]oncrete injury, whether actual or threatened, has been an indispensable element of a dispute and the prerequisite to taxpayer standing", *Schlesinger, supra* at 221, it does no more than pay lip service to this principle.

Judge Adams' conclusion that the violation of a "personal constitutional right is in and of itself a sufficiently definite injury to warrant standing" draws support from his reading of *Baker v. Carr*, 369 U. S. 186 (1962) and *Schempp v. Abington School District*, 374 U. S. 203 (1963). He wrote:

> The Supreme Court has often recognized that an allegation of "particular concrete injury" to a plaintiff's fundamental rights, as distinguished from the "abstract injury" in non observance of the Constitution asserted by litigants as citizens, can supply standing. *Americans United, supra* at 264. (A. 25)

But, in *Baker* the injury was direct and perceptible since the right to vote was threatened by dilution and in *Schempp* parents' and students' religious beliefs were impacted by a religious exercise. To say that these Respondents are entitled to a government which will not establish religion without any other noticeable impact is to say now to the *Schlesinger* plaintiff that he is entitled to a government that will not violate the incompatibility clause and to the *Richardson* plaintiff that a citizen is entitled to a government which will not violate Art. I, § 9, Cl. 7 (relating to the accountability of public monies).

Gloss, rather than substance is the result of laminating the "zone of interests" test of *Data Processing* into the analysis. *Americans United, supra* at 264. (A. 26) If government action violates a right protected by a statute or clause of the Constitution, the zone of non-economic values recognized in *Data Processing* is not needed. Yet, the Court implies that the Respondents' injury may have something to do with their "spiritual stake and First Amendment values." *Americans United, supra* at 264. (A. 26) There is no suggestion anywhere in this record that the Respondents' spiritual values have been damaged by the government action here challenged. No other non-economic value or indirect loss was pleaded and hence employment of the zone of interests test by the Court strains the point and remains puzzling.

Citizen-Separationists Are Ideological Plaintiffs; Citizens at Large Are Not Entitled to Standing

At several points in its opinion, the Court appears to distinguish these Respondents from the citizenry at large by creating standing for special interest groups, here, separationists.[22] The Court was no doubt concerned with

22. For an exposition of the separationist philosophy, *qua* ideology, see Sorauf, *supra*.

overcoming the *Schlesinger* holding that ". . . standing to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public . . ." *Schlesinger, supra* at 220.

Yet, it seems most unwise to accord standing to citizens who distinguish themselves from the polity by virtue of a historic or deep commitment to a principle. Special interest groups with deep commitments to all manner of ideological principles can be said to be differentiated from the citizenry at large. Standing for a citizen-separationist without taxpayer standing is the precedent for standing to sue for organizations and individuals who are citizen-conservationists, citizen-segregationists, citizen-liberals and citizen-conversatives and endless hyphenated standing formulations.

While the pleadings state that the organizational plaintiff has been committed to the principle of separation of church and state, the individual Respondents cannot distinguish their injury as anything different from that to citizenry at large. Respondent Settembrini testified that the injury "could be defined as general," and can "also be defined as specific" [23] Two other Respondents admitted that their injury was shared in common with other taxpayers.[24]

The Court affirmed that the Respondents ". . . are decidedly not ideological plaintiffs . . . intent on adjudicating their own generalized views concerning the legality of the challenged action." *Americans United, supra.* Separationism is an ideology, a point of view from which church-state issues are approached. This Court has never adopted the absolute as the approach to church-state relations; as Chief Justice Burger observed: "The course of constitutional neutrality . . . cannot be an absolute straight

23. Settembrini Deposition at 13-14.

24. Gunn Deposition at 25-26; Doerr Deposition at 36.

line; rigidity could well defeat the basic purpose [of the First Amendment]", *Walz v. Tax Commission*, 397 U. S. 664, 669 (1970). It is a view which competes with others such as "accommodationists" [25] which is equally an ideology. More to the mark, separationism is not the law of the land, the violation of which gives rise to a personal right of redress.

Respondents' depositions illustrate the wisdom of this Court's rationale for consistently closing federal courts to the litigation of rhetoric. Lacking harm or injury, Respondents by their lawsuit instead sought to debate what should have been done with the property. One Respondent thought it should have been utilized for the general welfare of all taxpayers.[26] Others thought it should be sold.[27] That a federal court not be used to permit citizens to second guess governmental choices, but only to redress wrongs is the foundation of this Court's standing rules. That foundation crumbles with the adoption of the opinion of the Third Circuit.

As the majority opinion winds to conclusion, Judge Adams appears to relinquish reliance upon these citizens as separationists and modifies the hypothesis to conclude that all citizens can challenge Establishment Clause violations *without taxpayer status.*

> An allegation of injury in fact to an interest protected by the Establishment Clause is all that is required for standing. *Americans United, supra* at 265. (A. 28)

No case decided by this Court has permitted citizen standing to challenge governmental action absent con-

25. The term "accomodationist" appears in Sorauf, *The Wall of Separation* (Princeton University Press 1976) in a chapter called "The Accommodationist Defendants".

26. Settembrini Deposition at 13.

27. Gunn Deposition at 12.

crete injury commonly supplied by taxpayer status. The concept of citizen standing was rejected by this Court in *Schlesinger*. It is apparent, as this Court observed in *Schlesinger*:

> The only interest all citizens share in the claim advanced by Respondents is one which presents injury in the abstract. Respondents seek to have the Judicial Branch compel the Executive Branch to act in conformity with the [*Schlesinger* reads the Incompatability Clause, but the Establishment Clause certainly fits], an interest shared by all citizens. *Id.* at 217.

The majority, conscious of the *Schlesinger* and *Richardson* limitations attempts a distinction which is verbal at most:

> The decision in *Reservists* and *Richardson* appear to be based on the inadequate nature of the plaintiffs' alleged injury in fact. *Americans United, supra* at 263. (A. 24)

Yet, the only difference between the injury alleged in those cases and that alleged here are the differing clauses of the Constitution. The Court of Appeals has said that for non-observance of the Establishment Clause a citizen suffers "concrete" injury; however, the same citizen is rendered uninjured and powerless to rectify the non-observance of all other clauses of the Constitution.

In its laborious journey to endorse citizen standing, it would seem that the Third Circuit failed to observe this Court's admonition in *Schlesinger*:

> Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing. *Schlesinger, supra* at 227.

CONCLUSION

Valley Forge Christian College respectfully prays the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Appendix.

Opinion of the United States Court of Appeals for the Third Circuit, Americans United for Separation of Church and State, Inc., Gunn, Andrew Leigh, Doerr, Edward D., Settembrini, Gioele, Binns, E. Mallary, Appellants v. United States Department of Health, Education and Welfare, United States of America, Northeast Bible College, a/k/a Valley Forge Christian College, No. 79-1221, filed April 8, 1980, 619 F2d 252 (1980).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 79-1221

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC., GUNN, ANDREW, LEIGH, DOERR, EDWARD D., SETTEMBRINI, GIOELE, BINNS, E. MALLARY,

Appellants

v.

THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, THE UNITED STATES OF AMERICA, NORTHEAST BIBLE COLLEGE, a/k/a VALLEY FORGE CHRISTIAN COLLEGE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C. A. No. 77-1321
Argued October 12, 1979
Reassigned February 7, 1980

Before: ADAMS, ROSENN and WEIS, *Circuit Judges*
(Filed April 8, 1980)

OPINION OF THE COURT.

ADAMS, *Circuit Judge.*

The question presented in this appeal is whether an organization devoted to the separation of church and state, and several of its members suing as individual citizens, have standing to challenge the transfer of government property to a concededly religious organization.

I. FACTUAL BACKGROUND

In August 1976, the Department of Health, Education and Welfare (HEW) conveyed 77 acres of surplus government property located in Valley Forge, Pennsylvania, as well as buildings, fixtures, and equipment situated thereon, to the Valley Forge Christian College. The property was transferred pursuant to the Federal Property and Administrative Services Act of 1949, which authorizes HEW to sell or to lease surplus government property to tax-exempt institutions for health and educational purposes.[1] In setting the sale or lease value of the property to be transferred, the Act requires the Secretary of HEW to consider any benefit that may accrue to the United States from the designated use of such property,

1. 40 U. S. C. § 484(k) (1976).

and to grant discounts, known as "public benefit allowances," to transferees.[2] In exchange for its agreement to use the property in conformance with specified educational purposes for a period of thirty years, HEW granted to the college a 100% public benefit allowance. As a result, the property was transferred without any financial payment by the college. The total fair value of the property, acquired by the government at an estimated cost of $10,374,386.00, was stated to be $1,303,730.00 at the time of transfer.

The Valley Forge Christian College is admittedly sectarian. Operated under the supervision of the Assemblies of God, the college's primary purpose is to train leaders for church-related activities. Its curriculum is devoted to bible study, Christian service, and theology. Attendance at daily chapel service and regular participation in Christian activities is mandatory for all students.

Numerous transfers of government property to hundreds of church-denominated institutions have been authorized under the Act. As a matter of practice, HEW nearly always grants these organizations a public benefit allowance ranging from 95% to 100% of the property's estimated fair value. In this manner, HEW has in most cases relieved the benefitted religious organizations of the obligation to make financial payment for property received. Since the enactment of this Act, HEW has authorized more than 650 separate transfers of surplus government property to various religious institutions. The total fair market value of government property transferred to denominationally sponsored organizations during this period amounted to more than $25,700,000.00. The initial cost of acquiring this property was over $64,494,000.00.

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2. Id. 45 C. F. R. § 12 (1978).

Americans United for Separation of Church and State, Inc., a nonprofit, tax-exempt organization claiming a membership of 90,000, and four of its individual directors, citizens and taxpayers of the United States, challenged HEW's transfer of government property to the Valley Forge Christian College. As defined by its Articles of Corporation, American United's purpose is "to defend, maintain and promote religious liberty and the constitutional principle of the separation of church and state." The plaintiffs alleged that this property transfer constituted a violation of their individual rights protected by the Establishment Clause of the First Amendment, and sought declaratory and injunctive relief to void the transfer. On the defendants' motion, the district court dismissed the suit on the ground that plaintiffs lacked standing as taxpayers to challenge a transfer of property pursuant to the Federal Property and Administrative Services Act. This appeal is from that judgment.

Although we accept the district court's conclusion that the plaintiffs lack *taxpayer* standing to contest the challenged conduct, we disagree with its conception of the legal identity assumed by the plaintiffs in this case. Americans United for Separation of Church and State, a nonprofit organization, is precluded by its very nature from assuming the status of taxpayer. And while the four members of this organization suing as individual plaintiffs do assert standing as taxpayers, none of them does so exclusively or as a matter of primary concern. The plaintiffs' essential contention, rather, is that the governmental conduct in question caused them individuated injury because it abridged their right—protected by the Establishment Clause of the First Amendment—to a Government that does not establish religion. Because the constitutional injury complained of by the plaintiffs gives them a sufficient "personal stake" in the present

controversy to assure the court a "complete perspective" of the issues, and because the interest they seek to protect is arguably within the zone of interests protected by the Establishment Clause of the First Amendment, we hold that the plaintiffs possess legal standing to maintain this action. Accordingly, we will reverse the judgment of the district court.

II. The Standing Requirement in General

The concept of standing to sue derives essentially from Article III of the Constitution, which extends the federal judicial power only to certain classes of "cases" and "controversies."[3] Standing differs from the other elements of justiciability in that it focuses primarily on the status of the litigant, and only secondarily on the issues he wishes to have adjudicated.[4] Although the case or controversy requirement provides the framework within which the question of standing in federal courts must be considered,[5] Article III merely delimits the jurisdiction of

3. U. S. Const. art. III, § 2, states:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

4. Flast v. Cohen, 392 U. S. 83, 99 (1968).

5. Association of Data Processing Serv. Organizations v. Camp, 397 U. S. 150, 151 (1970).

federal courts; it neither defines nor is it synonymous with the doctrinal limitations of standing. As the Supreme Court has asserted, "the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." [6] Yet, the doctrine of standing reflects as well a blend of policy considerations that are "not always clearly distinguished from the constitutional limitation." [7]

Courts and commentators have been confounded for many years by the question of standing.[8] To a considerable degree, the complexities and uncertainties stem from its case-by-case course of development, which has been "more or less determined by the specific circumstances of individual situations." [9] The rules of standing have been fashioned not in the abstract, but "with specific reference to the status asserted by the party whose standing is challenged and to the type of question he wishes to have adjudicated." [10] For this reason, the Supreme Court has

6. Flast v. Cohen, 392 U. S. 83, 101 (1968), *quoted in* Association of Data Processing Serv. Organization v. Camp, 397 U. S. 150, 151-52 (1970).

7. *Id.* at 97 (quoting Barrows v. Jackson, 346 U. S. 249, 255 (1953)).

8. One recent commentator has insisted that the law of standing "lacks a conceptual framework" and amounts to "little more than a set of disjointed rules dealing with a common subject." Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 Cornell L. Rev. 663 (1977). Another has concluded that the "whole law of standing is so confused and cluttered . . . that the lower courts and practitioners especially need Supreme Court guidance." K. Davis, Administrative Law of the Seventies § 22.00.-01, at 167 (Supp. 1977).

9. United States *ex rel.* Chapman v. Federal Power Comm., 345 U. S. 153, 156 (1953).

10. Flast v. Cohen, 392 U. S. 83, 101 (1968).

declared that "[g]eneralizations about standing to sue are largely worthless as such." [11] Only by distinguishing the different contexts in which the Supreme Court has attempted to give "some meaningful form . . . to the jurisdictional limitations placed on federal court power by the concept of standing," [12] is it possible to reach some comprehension of what the requirement entails.

Early discussions by the Court regarding the question of standing were anchored in the notion of a "legally protected interest" on the part of the litigant.[13] Under this approach, standing to litigate was conditioned on a showing by the plaintiff that the challenged governmental action threatened one of his legally protected interests.[14]

11. Association of Data Processing Serv. Organizations v. Camp, 397 U. S. 150, 151 (1970).

12. Flast v. Cohen, 392 U. S. 83, 99 (1968).

13. *See, e.g.*, Perkins v. Lukens Steel Co., 310 U. S. 113, 125 (1940); Tennessee Elec. Power Co. v. TVA, 306 U. S. 118, 137 (1939); Alabama Power Co. v. Ickes, 302 U. S. 464, 479 (1938).

14. Tenessee Power Co. v. TVA, 306 U. S. 118, 136-37, 147 (1939). The "legal interest" inquiry was a product of the traditional legal order in which a court's basic function was to settle disputes between private individuals regarding property or liberty of person. As civil litigation against government officials evolved, there remained a need to perceive an ownership claim before courts could recognize an individual whose ownership interest could be adjudicated. It was only natural for courts to seek to accommodate such litigation within the existing structure of legal thinking and language appropriate to private dispute settlement. Challenges to governmental action thus triggered judicial inquiry into whether such action had invaded the complainant's legally protected interest. Courts in effect sought guidance from other areas of the law in order to determine whether a plaintiff's alleged interest was deserving of judicial protection. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 Harv. L. Rev. 645, 650 (1973). For an illuminating discussion, see J. Vining, Legal Identity 13-33 (1978).

Only if the plaintiff demonstrated an invasion of such an interest would the courts respond to claims of serious harm or injury resulting from illegality.[15] As challenges to governmental conduct increased during the course of this century, however, observation of the "legal interest" test "became steadily more perfunctory, and the link with private-dispute settlement more tenuous."[16] Litigants increasingly recognized, and desired to attack, the impact of governmental conduct on these so-called "noneconomic" values. Judicial reluctance to deny standing to such individuals consequently led to the conceptualization of individual and organizational interests in noneconomic values as legally protected interests. As the "legal interest" test was increasingly expanded to include such values, however—especially in the case of challenges brought under the Constitution and certain statutes that imposed rules of conduct on the government without specifying any private remedies for their enforcement—the exercise began to lose its point, and eventually was abandoned. In two cases decided in 1970, *Association of Data Processing Service Organization v. Camp*[17] and *Barlow v. Collins*,[18] the "legal interest" test for standing, which "had become symbolically definitive even as it was increasingly

15. As Justice Frankfurter elaborated: "A litigant ordinarily has standing to challenge governmental action of a sort that, if taken by a private person, would create a right of action cognizable by the courts. . . . Or standing may be based on an interest created by the Constitution or a statute. . . . But if no comparable commonlaw right exists and no such constitutional or statutory interest has been created, relief is not available judicially." Joint Anti-Fascist Refugee Comm. v. McGrath, 351 U. S. 123, 152 (1951) (concurring opinion).

16. J. Vining, *supra* note 14, at 23.

17. 397 U. S. 150 (1970).

18. 397 U. S. 159 (1970).

ignored,"[19] was finally overruled explicitly and replaced by a new formulation of the standing doctrine.

A. The Modern Law of Standing: Personal Injury in Fact

The modern law of standing, set forth in *Data Processing* and *Barlow* and reaffirmed in the same words since, requires no more than an allegation that the challenged official action has caused the plaintiff "injury in fact, economic or otherwise,"[20] to an interest "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[21] Requiring "injury in fact" ensures that standing to sue is conferred only on individuals having a "personal stake in the outcome" of a controversy, and not on those with merely generalized or external preferences about its outcome.[22] Personal injury to a cognizable interest of the litigant, it is felt, will assure "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult

19. J. Vining, *supra* note 14, at 26-27.

20. Data Processing Serv. Organizations v. Camp, 397 U. S. at 152.

21. *Id.* at 153.

22. Baker v. Carr, 369 U. S. 186, 204 (1962), *quoted in* Flast v. Cohen, 392 U. S. 83, 101 (1968).

For a discussion of the distinction between "personal" and "external" preferences *see* R. Dworkin, Taking Rights Seriously 234-39 (1977). External preferences need not be independent of, indeed they may reinforce, personal preferences. *See* Sierra Club v. Morton, 405 U. S. 727, 738 (1972) ("The test of injury in fact goes only to the question of standing to obtain judicial review. Once this standing is established, the party may assert the interests of the general public in support of his claims for equitable relief.").

. . . questions." [23] As a result, when standing is placed in issue today, the question is "'whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue' and not whether the controversy is otherwise justiciable, or whether, on the merits, the plaintiff has a legally protected interest that the defendant's action invaded." [24]

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23. Baker v. Carr, 369 U. S. 186, 204 (1962), *quoted in* Barlow v. Collins, 397 U. S. at 170-71 (Brennan, J., concurring and dissenting). "We may reasonably expect," as Justice Brennan noted in *Barlow*, "that a person so harmed will, as best he can, contest the issues with the necessary adverseness, and pursue the litigation vigorously." 397 U. S. at 172-73 (footnote omitted).

24. Barlow v. Collins, 397 U. S. at 171 (Brennan, J., concurring and dissenting) (footnote omitted) (quoting in part Flast v. Cohen, 392 U. S. at 99-100). The discrediting of the "legal interest" test, as Professor Vining has suggested, represented "not simply an incremental development, but a shift in the axioms of legal thinking" *supra* note 14, at 39. "The 'legal interest' test," the Supreme Court said in *Data Processing*, "goes to the merits. The question of standing is different." 397 U. S. at 153. This important distinction between whether a plaintiff is a proper party to request an adjudication of a particular issue and whether that issue itself is justiciable had been drawn by the Court two years previous in *Flast v. Cohen*, 392 U. S. 83, 95 (1968). Prior to that decision, however, the existence or nonexistence of a "legal interest" was not, as the Supreme Court subsequently held, "a matter quite distinct from the problem of standing." Association of Data Processing Serv. Organizations v. Camp, 397 U. S. at 153 n. 1. On the contrary, prior statements had bound together standing, the merits, and the remedy. If the plaintiff was given standing to assert his claims, his interests were legally protected; if he was denied standing, his interests were not legally protected. The separation in *Data Processing* and *Barlow* of the question of standing to sue, on the one hand, from those of the merits and the remedy, on the other, thus reflected a fundamental departure. It represented a new awareness of judicial power and a willingness to address issues and provide remedies even when "the merits do not seem to focus on the situation of a particular individ-

The categories of injury that may be alleged to support a litigant's standing to sue have increased considerably since the modern formulation of the standing doctrine in *Data Processing* and *Barlow*. Various allegations of harm have been recognized by the Supreme Court as sufficient to meet the requirement of "injury in fact." The most commonly recognized "injury in fact" has been economic in nature. In *Data Processing*, for example, the economic interests of data processors in agency rulings allowing nationally regulated banks to compete in the data processing industry supplied the requisite personal stake for the processors to challenge the agency action. Yet the Supreme Court went out of its way "to emphasize that standing may stem from [noneconomic values] as well as from . . . economic injury." [25] In particular, the Court indicated that injury to aesthetic, conservational, recreational, and spiritual values may satisfy the "injury in fact" requirement.[26]

Dictum in *Data Processing* to the effect that the alleged injury necessary to confer standing need not be of an economic nature was soon fortified. In *Sierra Club v. Morton*,[27] the complainant alleged that a road development through a National Park would adversely affect the scenery and wildlife of the area, and would impair the enjoyment of the park in the future. Although the Supreme Court denied standing because the Sierra Club had not alleged that its members would be personally injured by the development, it did not question that "this type of

24. (Cont'd)
ual" or "no remedy restoring or protecting a person as such and by 'name' is appropriate." J. Vining, *supra* note 14, at 44.

25. 397 U. S. at 154.

26. *Id.*

27. 405 U. S. 727 (1972).

harm may amount to 'injury in fact' sufficient to lay the basis for standing." [28] The Court later validated environmental injury as a basis for standing. In *United States v. SCRAP*,[29] a group of law students who used the public parks challenged an agency ruling allowing a railroad rate increase which they claimed would result in greater litter in the parks. Noting that the claimed injury to the environment was "far less direct and perceptible" than that at issue in *Sierra Club*, and that the line of causation offered was "far more attenuated," the Court nonetheless concluded that the plaintiffs had alleged "a specific and perceptible harm" sufficient to satisfy the test of injury in fact.[30]

An allegation that official action violates the plaintiff's constitutional rights may also set forth a sufficient injury to meet the "injury in fact" test. In *Baker v. Carr*,[31] for instance, an asserted injury to voting rights supplied the basis for standing to attack the constitutionality of an apportionment scheme that allegedly diluted the relative effectiveness of the plaintiffs' right to vote. And in *Abington School District v. Schempp*,[32] standing to contest the constitutionality of Bible-reading in public schools was conferred on students and their parents who claimed that the practice violated their individual rights under the Establishment Clause.

Although it is now unquestioned that standing to sue may be premised on injury to noneconomic as well as economic values, "the injury in fact test requires more

28. *Id.* at 734.

29. 412 U. S. 669 (1973).

30. *Id.* at 688-89.

31. 369 U. S. 186 (1962).

32. 374 U. S. 203 (1963).

than an injury to a cognizable interest." [33] The acceptance of new categories of judicially cognizable injury has not eliminated the basic principle that to invoke judicial power the claimant must allege personal injury that has been variously described by the Supreme Court as "particular" or "concrete," "specific" or "direct," rather than "general and abstract." Desirous to ensure that individuals most affected by the questioned activity have a role in the challenge, the Court has consistently refused to confer standing on plaintiffs seeking to vindicate merely their own generalized views regarding constitutionality, legality, or the public interest.[34] Failure to set forth individuated injury, therefore, even in the presence of a "case or controversy," deprives a litigant of standing. Yet, as the *Sierra* Court indicated, the fact that the alleged injury is "shared by the many rather than by the few does not make them less deserving of legal protection through the judicial process." [35] So long as an allegation of personal injury to a cognizable interest represents

33. Sierra Club v. Morton, 405 U. S. at 734-35.

34. *E.g.* Schlesinger v. Reservists Comm. to Stop the War, 418 U. S. 208 (1974); United States v. Richardson, 418 U. S. 166 (1974); Sierra Club v. Morton, 405 U. S. at 734-35. The *Sierra* Court readily conceded that "an organization whose members are injured may represent those members in a proceeding for judicial review." But it nonetheless refused to confer standing on the plaintiff organization because the Club failed to allege that it or its members would be affected in any of their activities by the challenged action. As the Court explained: "The requirement that a party seeking review must allege facts showing that he himself is adversely affected does not insulate executive action from judicial review, nor does it prevent any public interest from being protected through the judicial process. It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome." *Id.* at 739-40.

35. *Id.* at 734.

"an individuated interest of the litigant as distinguished from the polity as a whole," [36] it supplies the "personal stake in the outcome" needed for standing regardless of how many individuals share that injury. To be individuated, "an interest need only be expressible in terms of the individual litigant's concrete satisfaction or experiences; but such satisfactions or experiences need not be *unique* to the litigant." [37]

C. *Taxpayer Standing*

The more "distinctive and discriminating" the harm alleged by a plaintiff, and the more clearly linked it is to the action challenged, the more easily a plaintiff may meet the "injury in fact" test. When a plaintiff claims such harm, there is no need to consider what must be set forth to satisfy the standing requirement by a party who avers no special harm, but sues rather as a taxpayer to vindicate the interests of taxpayers generally.[38] In the absence of any allegation of individuated injury, however, an individual suing in his capacity as a taxpayer may nonetheless be able to demonstrate, under certain limited circumstances, a sufficient "personal stake in the outcome" to allow him to argue the merits of the cause.

Flast v. Cohen [39] enunciated the modern law of federal taxpayer standing. As defined by the Court, the question presented there was "whether a litigant asserting *only* his status as a taxpayer has standing to maintain a

36. L. Tribe, American Constitutional Law § 3-19, at 85 (1978).

37. *Id.* As the Court later held in *United States v. SCRAP*, 412 U. S. at 687: "standing is not to be denied simply because many people suffer the same injury."

38. Barlow v. Collins, 397 U. S. 159, 172 n. 5 (1970) (Brennan, J., concurring in the result and dissenting).

39. 392 U. S. 83 (1968).

suit in federal court."[40] Plaintiff-taxpayers in that case disputed the expenditure of federal funds to finance instruction and materials for use in religious schools on the ground that this abridged the Establishment Clause. In granting standing, the Supreme Court set forth two rules governing its decision. First, in order to maintain a suit, a "taxpayer must establish a logical link between that status and the type of legislative enactment attacked."[41] The Court apparently believed that such link could be demonstrated only if a successful suit might possibly result in some decrease in taxes. "Thus," the Court explained, "a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8 of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute."[42] Second, the taxpayer must establish a nexus between his taxpayer status and the nature of the constitutional transgression claimed. "Under this requirement," the Court declared, "the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8."[43]

Because the program attacked in *Flast* dealt with a substantial expenditure of tax funds, rather than an incidental payment in the administration of an essentially regulatory statute, the Court found that the plaintiff-

40. *Id.* at 91 (emphasis added).

41. *Id.* at 102.

42. *Id.*

43. *Id.* at 102-03.

taxpayer satisfied the first requirement. The Court then discerned, on the basis of a remark by James Madison,[44] an intent on the part of the Framers of the Constitution to protect taxpayers, as special beneficiaries, from the use of the taxing and spending power to support religion. "The Establishment Clause was designed as a specific bulwark against potential abuses of governmental power," the Court elaborated, and it "operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power."[45] The Court accordingly granted the plaintiffs standing, "That the Framers could at most have intended to protect taxpayers as a means to the protection of religious liberty was inconsequential: it was enough that they were protected as secondary beneficiaries."[46]

The two-part nexus test of *Flast* has been criticized. It is uncertain why a taxpayer should *be* precluded from questioning congressional spending authorized by a constitutional provision other than the taxing and spending clause. All government disbursements and expenditures, it has been asserted, are exercises of the spending power, even if also supported by some other constitutional provision. In addition, it is often difficult to distinguish governmental action that is primarily spending from activities primarily regulatory. The Court has nevertheless "drawn a sharp if artificial distinction"[47] between attacks by tax-

44. "'[T]he same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever. [Memorial and Remonstrance Against Religious Assessments.] 2 Writings of James Madison 183, 186 (Hunt ed. 1901).'" 392 U. S. at 103.

45. *Id* at 104.

46. J. Vining, *supra* note 14, at 109.

47. L. Tribe, *supra* note 36, § 3-19, at 84 n. 18 (1978).

payers on spending programs as such and attacks on other kinds of programs. As for the distinction between specific and nonspecific limitations on the taxing and spending power, it has been forcefully argued that a taxpayer's stake in the outcome of the dispute is the same regardless of the nature of the limitation. "A person who has standing to challenge for one kind of illegality that adversely affects him," Professor Davis contends, "necessarily has standing to challenge for another kind of illegality that adversely affects him to the same extent."[48] The Supreme Court has offered no guidelines for distinguishing between specific and nonspecific limitations. And while the Court expressly left open the question whether the Constitution contains other specific limitations,[49] taxpayer standing to challenge official action has since been strictly confined to actions premised on the Establishment Clause.

III. Standing Under the Establishment Clause

The district court first refused to recognize the plaintiffs' standing under the Establishment Clause. Then it denied jurisdiction on the assumption that the allegation of injury to plaintiffs' economic interests in reduced taxes offered the only possible basis for standing. From this assumption, the district court decided that the plaintiffs lack standing as taxpayers under *Flast*, because they cannot show a logical link between their taxpayer interest and the claim sought to be adjudicated. The legislation authorizing the transfer in question was enacted pursuant to the property clause of the Constitution, which provides Congress the "Power to dispose of . . . Property belonging to the United States."[50] Relying on the suggestion in

48. Davis, *Standing—Taxpayers and Others*, 35 U. Chi. L. Rev. 601, 604 (1968).

49. Flast v. Cohen, 392 U. S. at 105.

50. U. S. Const. art. IV, § 3, cl. 2.

Flast that litigants asserting their interest as taxpayers have standing "to allege the unconstitutionality only of exercises of Congressional power under the taxing and spending clause," the district court concluded that the logical nexus between the asserted taxpayer interest and the disposition of the property challenged here is too strained to bring the plaintiffs within the narrow contours of taxpayer standing.

We do not dispute the district court's determination that under the law as it presently exists, individuals asserting *solely* their interest as taxpayers have standing to challenge only exercises of the taxing and spending power, and not actions authorized by other constitutional provisions. Inasmuch as litigants suing in the capacity of taxpayers must show that the activity in question involves substantial taxing and spending, it may well be that the plaintiffs here lack *taxpayer* standing. We do question, however, the assumption by the district court that the *only* basis advanced by the plaintiffs in support of their standing claim is, or must be, alleged injury to their interest as taxpayers.

The heart of plaintiffs' complaint is that the challenged governmental action caused "injury in fact" to their shared individuated right to a government that "shall make no law respecting the establishment of religion." Even the plaintiffs themselves would acknowledge that their allegation of taxpayers status is essentially an assumed role, set forth in response to uncertain pleading requirements. Plaintiffs have no reason to expect, nor perhaps do they care about, any personal tax saving that might result should they prevail. The crux of the interest at stake, the plaintiffs argue, is found in the Establishment Clause, not in the supposed loss of money, as such. As a matter of primary identity, the plaintiffs are not so much taxpayers as separationists, and their main concern

is not a reduction in taxes, but their declared goal of separation of church and state.

As enunciated in *Flast*, the doctrine of taxpayer standing was not meant to qualify the general standing requirement of a "personal stake in the outcome." To the contrary, *Flast's* purpose was to outline a limited set of circumstances in which an allegation of financial injury in the form of increased tax liability by itself might be considered an acceptable stake on which to predicate standing, quite apart from any allegation of individuated injury to other judicially cognizable interests. Indeed, the *Flast* court apparently found itself forced to premise standing on the plaintiff's taxpayer interest, solely because it discerned no other allegation of injury that could supply the requisite personal stake in the outcome. The Court described its "point of reference" as well as its "starting point for analysis," to be "the standing of individuals who assert *only* the status of federal taxpayers." [51] As viewed by the Court, the question presented was "under what circumstances a federal taxpayer whose interest stemmed *solely* from the taxes he paid to the Treasury '[would] be deemed to have the personal stake and interest that impart the necessary concrete adverseness to such litigation so that standing can be conferred on the taxpayer *qua* taxpayer consistent with the constitutional limitations of Article III.'" [52] In no case outside the

51. 392 U. S. at 91, 102. Although the court apparently understood the plaintiffs to be premising their standing solely on their status as taxpayers—and decided the case on that basis—the plaintiffs in their brief to the Court did assert not only this "pocketbook injury," but also "an injury to the right to live under a government which separates itself strictly from the church and church affairs." Brief for Appellant at 37.

52. United States v. Richardson, 418 U. S. 166, 205 (1974) (Stewart, J., dissenting) (quoting in part *Flast v. Cohen*, 392 U. S. 83, 101 (1968)).

context of taxpayer suits, however, has the Supreme Court demanded a subject matter nexus between the injury asserted and the constitutional claim sought to be adjudicated. Indeed, in *Schlesinger v. Reservists to Stop the War* [53] the Court explicitly rejected such a broad compass for the *Flast* nexus requirement. For the nexus criteria developed in *Flast* for *taxpayer* standing, "were not intended as a litmus test to resolve all conceivable standing questions in the federal courts." [54] They were fashioned, rather, "solely as a determinant of standing of plaintiffs alleging only injury as taxpayers to challenge federal legislation." [55] The Court recently affirmed this position in *Duke Power Co. v. Carolina Environmental Study Group*, by expressly stating that outside the context of taxpayers' suits, a litigant must demonstrate nothing more than "injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury to satisfy the 'case or controversy' requirement." [56]

The enormous labor spent by the Court to extend standing to the plaintiff in *Flast* through the precarious opening of taxpayer standing is best understood as a function of the Court's acknowledged "point of reference"—it found no allegation of injury except that claimed by the litigants in their capacity as a federal taxpayer. It was this perceived limitation in the pleadings and nothing else, we believe, which constrained the Court

53. 418 U. S. 208, *id.* at 225 n. 15 (1974). This requirement, the Court noted, "is not appropriate on a claim of citizen standing since the *Flast* nexus test is not applicable where the taxing and spending power is not challenged. . . ."

54. United States v. Richardson, 418 U. S. at 205.

55. Schlesinger v. Reservists to Stop the War, 418 U. S. 208, 238 (1974) (Brennan, J., dissenting).

56. 438 U. S. 59, 79 (1978) (footnote omitted).

in *Flast* from deciding that the plaintiffs' interest in the establishment issue, without reference to their taxpayer status, would supply a stake sufficient to support standing. The underlying justification for according standing in *Flast* it seems, was the implicit recognition that the Establishment Clause does create in every citizen a personal constitutional right, such that any citizen, including taxpayers, may contest under that clause the constitutionality of federal expenditures. As previously suggested, it is because "each citizen has a personal stake in ensuring that the Government not establish a religion," that "a citizen apparently does suffer a sufficiently personal injury to confer standing when he is taxed to support a religious institution." [57]

In contrast to the construction of the plaintiffs' contentions in *Flast*, the litigants here *do* allege injury in fact to an interest other than the economic interest they share as taxpayers. They claim that the challenged action injures their important concern in the separation of church and state and that this is within the zone of interests protected by the Establishment Clause of the First Amendment. Thus, their appeal squarely presents the novel and important question posed by Justice Fortas in *Flast*, which the Court did not reach and thus did not decide: whether "the vital interest of a citizen in the establishment issue, without reference to his taxpayer's

57. Richardson v. United States, 465 F. 2d 844, 865 (3d Cir. 1972) (in banc) (Adams, J., dissenting), *rev'd*, 418 U. S. 166 (1974). "[T]he establishment clause was surely intended to protect not merely or even primarily taxpayers as such, but all citizens of the new nation who believed in religious liberty and feared enforced conformity to a state religion; it would therefore seem to follow that any citizen should have standing in a case like *Flast*, since each has a logical nexus between his status as citizen and the claim that federal programs violate the first amendment." Scott, *supra* note 14, at 662.

status, would be acceptable as a basis for [standing to bring] this [kind of] challenge." [58]

The question of "the vital interest of a citizen in the establishment issue" must be distinguished from the question of "citizen standing" as such. The Supreme Court has consistently admonished that a citizen who suffers equally with all other citizens will not be heard to raise generalized grievances about the conduct of the Government.[59] In *Reservists*, for example, individuals suing as citizens attempted to prevent certain members of Congress from serving at the same time as officers of the Armed Forces reserve.[60] They alleged that the incompatibility clause of Article I, § 6 renders members of Congress "ineligible to hold a commission in the Armed Forces Reserve during his [or her] continuance in office." [61] Holding that the plaintiff lacked standing, the Court stated: "standing to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share. Concrete injury whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution." [62] All citizens,

58. 392 U. S. at 115-16 (concurring opinion).

59. *E.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U. S. 208 (1974); United States v. Richardson, 418 U. S. 166 (1974).

60. 418 U. S. at 227-28. Standing in their capacity as taxpayers was denied on the basis of Flast v. Cohen, 329 U. S. 83, 102-3 (1968).

61. 418 U. S. 208 (1974). The incompatibility clause states: "no person holding any office under the United States shall be a member of either House during his Continuance in Office." U. S. Const. art. I, § 6.

62. *Id.* at 209.

the Court noted, share equally an interest in constitutional government. "In some fashion, every provision of the Constitution was meant to serve the interests of all."[63] Yet, to recognize "[s]uch a generalized interest" as a sufficient basis for citizen standing to enforce judicially all constitutional provisions, "simply because citizens are the ultimate beneficiaries," the Court concluded, "has no boundaries."[64]

A similar question was raised in *United States v. Richardson*.[65] There, a taxpayer and citizen sought to challenge a statute that allowed the Central Intelligence Agency to avoid publicly accounting for its receipts and expenditures, in alleged violation of Article I, § 9's requirement that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." Although the Court conceded that the plaintiff had a genuine interest in the use of public funds, it found his claims "plainly undifferentiated" and "common to all members of the public."[66]

Accordingly, because he had failed to demonstrate a "'personal stake in the outcome,' . . . or a particular, concrete injury . . . in short, something more than 'generalized grievances,'"[67] the plaintiff was denied standing. Ideological plaintiffs, with simply "a mere 'interest in a problem'",[68] will not be permitted to assert the public interest in a constitutional claim.

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63. *Id.* at 226-27.

64. *Id.* at 227.

65. 418 U. S. 166 (1974).

66. *Id.* at 177 (quoting *Ex parte* Levitt, 302 U. S. 633, 634 (1937) (per curiam)).

67. *Id.* at 106.

68. Sierra Club v. Morton, 405 U. S. 727, 739 (1972).

The decisions in *Reservists* and *Richardson* appear to be based on the inadequate nature of the plaintiff's alleged injury in fact. In both cases, the Court sought to distinguish the "abstract injury in nonobservance of the Constitution asserted by respondents as citizens" from what it described as "direct" or "concrete" injury.[69] As applied by the Court, however, the "injury in fact" requirement was not independent from the related inquiry regarding the interest sought to be protected. Thus, in *Schlesinger*, the Court noted that, unlike allegations asserting violation of "some limitation of the Constitution," in which case "it can only be a matter of speculation whether the claimed violation has caused concrete injury to the particular complainant," an allegation of "concrete injury" to "fundamental . . . rights" may supply "a personal stake . . . sufficient to support standing."[70] In similar fashion, the Court in *Richardson* found it "open to serious question whether the Framers of the Constitution ever imagined that general directives to the Congress or the Executive would be subject to enforcement by an individual citizen."[71] It would appear, therefore, that the Court's consistent refusal to grant "citizen standing" to ideological plaintiffs seeking to litigate the public interest has turned as much on the inadequacy of the alleged interest sought to be protected as it has on the deficiency of the injury alleged.[72]

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69. Schlesinger v. Reservists Comm. to Stop the War, 418 U. S. at 223 n. 15.

70. *Id.*

71. 418 U. S. at 178 n. 11.

72. In a recent article, Professor Tushnet has argued that a preference by the Supreme Court for "better" plaintiffs stands as an implied limitation upon the conferral of standing. *See supra* note 8, at 690-93. In both *Reservists* and *Richardson*, the Supreme Court recognized a similar argument "that if respondents could not

The Supreme Court has often recognized that an allegation of "particular concrete injury" to a plaintiff's fundamental rights, as distinguished from the "abstract injury" in nonobservance of the Constitution asserted by litigants as citizens, can supply a personal stake in the outcome sufficient to support standing.[73] Thus, in *Baker v. Carr*,[74] an asserted injury to the plaintiff's fundamental right to vote was deemed a sufficient personal stake to

72. (Cont'd.)
obtain judicial review of petitioner's action, 'then as a practical matter no one [could]' "; but in each case the Court emphasized that the lack of a better plaintiff was "irrelevant" to the question of standing. "The assumption that if respondents have no standing to sue, no one would have standing," the Court stressed, "is not a reason to find standing." Schlesinger v. Reservists to Stop the War, 418 U. S. at 227; *see* United States v. Richardson, 418 U. S. at 179. Much as the lack of a better plaintiff is insufficient by itself to confer standing on a litigant, the possible availability of a better plaintiff would also appear irrelevant to the question of an individual litigant's standing to maintain a particular claim. Whenever a party's standing is challenged the question for decision is simply whether that litigant "has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." Sierra Club v. Morton, 405 U. S. at 731. In the present appeal, for instance, it might well be argued that Americans United is not as "good" a plaintiff as would be a nonsectarian educational institution that had actually applied for the award of government property in question, but lost out to the Valley Forge Christian College. Yet the fact that such an organization might make a "better plaintiff" cannot justify a denial of standing to plaintiffs here inasmuch as they in fact allege injury in fact to an individuated right protected by the Constitution.

73. Abington School Dist. v. Schempp, 374 U. S. 203 (1963); Baker v. Carr, 369 U. S. 186 (1962); *see* Schlesinger v. Reservists Comm. to Stop the War, 418 U. S. 208, 223 n. 13 (1974); United States v. SCRAP, 412 U. S. 669, 689 n. 14 (1973).

74. 369 U. S. 186 (1962).

support standing. And in *Schempp*,[75] the Court summarily affirmed the plaintiffs' standing to raise substantive challenges on the basis of the Establishment Clause. In so doing, the Court noted in particular that "the requirements for standing to challenge state action under the Establishment Clause, unlike those relating to the Free Exercise Clause, do not include proof that particular religious freedoms are infringed."[76] Moreover, in *Data Processing* the Supreme Court expressly instructed that "a spiritual stake in First Amendment values [is] sufficient to give standing to raise issues concerning the Establishment Clause."[77] This is not to suggest, however, that a litigant claiming only that a contested action deprives someone else, or the public generally, of a constitutional right has alleged a personal stake in a controversy sufficient to confer standing. Indeed, the requirement of an allegation by plaintiffs that they have suffered injury in fact "embodies a refusal by Article III courts to resolve disputes involving only generalized grievances, or only the rights or interests of third parties."[78]

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75. 374 U. S. 203 (1963).

76. *Id.* at 224 n. 9.

77. 397 U. S. at 154.

78. L. Tribe, *supra* note 36, § 3-19 at 82. *See* Note, "Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423, 428-30 (1974).

In the case of overbreadth challenges under the free speech clause of the First Amendment, the Supreme Court has extended the concept of standing to allow individuals whose conduct may be regulated or proscribed by a statute to assert that the statute is unconstitutionally overbroad with respect to third parties not before the court. Broadrick v. Oklahoma, 413 U. S. 601 (1973). Moreover, the Court has granted standing in such cases not only to one who has been charged with a violation of the statute but also to one merely threatened with such prose-

The litigants in the present appeal, however, are decidedly not ideological plaintiffs, lacking any personal stake in the controversy yet intent on adjudicating their own generalized views concerning the legality of the challenged action. On the contrary, plaintiffs here advance neither an abstract nor a generalized complaint but set forth instead a particular and concrete injury to a right that is allegedly protected by the constitutional guarantee raised. Nor do the plaintiffs rest their complaint on the claim that the disputed action deprives someone else, or the public generally, of a legal right. Their claim, rather, is that the challenged transfer of government property to a religious institution seriously injures their individual and personal constitutional right of religious liberty and separation of church and state. Unlike the general limitations at issue in *Reservists* and *Richardson*, certain other constitutional provisions, such as the First Amendment, create legal rights in individuals. Yet, unless individuals claiming an encroachment of their legal rights have some recourse other than the political process for the vindication and protection of those rights, the proud claim that individual citizens have rights against the government may be emptied of significance. As the Supreme Court has stated: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the

78. (Cont'd.)

cution. Dombrowski v. Pfister, 380 U. S. 479 (1965). Even under this liberalized approach, however, the litigant seeking to challenge the allegedly overbroad statute must be either specifically charged or threatened with prosecution under that statute. A plaintiff not so charged or threatened but who nonetheless challenges such a statute lacks the personal stake in the outcome of the controversy for the conferral of standing. *See* Laird v. Tatum, 408 U. S. 1 (1972).

reach of majorities and to establish them as legal principles to be applied by the courts." [79]

The claim that individual citizens are entitled to judicial enforcement of their rights does not, of course, tell us exactly what Constitutional rights individuals have against the government. But plaintiffs need not establish that they actually have a legal right under the Establishment Clause to be free from the kind of governmental conduct in question. An allegation of injury in fact to an interest protected by the Establishment Clause is all that is required for standing. Only if the court determines, after consideration of the merits, that the governmental action is barred by the Establishment Clause, will it thereby recognize legal rights in the plaintiffs. It is certainly not irrelevant to the prior determination, however, that the very first words of the Bill of Rights declare that: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." [80] The two clauses do not represent separate and distinct conceptions, but a unified one; together they serve the broad common purpose of religious liberty. As a means to that end, we believe it is at the very least arguable that the

79. West Virginia State Bd. of Educ. v. Barnette, 319 U. S. 624, 638 (1943). In particular, the Court indicated that: "One's right to speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Id*

80. U. C. Const. amend. I.

As one constitutional scholar has argued: "It is no historical accident that the two religion-related guarantees of the Bill of Rights are stated as the very first provisions of that historic document. . . . the draftsmen of the Bill of Rights, working in the perspective of a history known to them all, put first things first." Jones, *Church-State Relations: Our Constitutional Heritage, in* Religion and Contemporary Society 156, 163 (H. Stahmer ed. 1963).

Establishment Clause creates in each citizen a "personal constitutional right" to a government that does not establish religion.[81] The essence of the argument, as Justice Harlan recognized, is "that freedom from establishment is a right that inheres in every citizen, thus any citizen should be permitted to challenge any measure that conceivably involves establishment." [82] As a cornerstone of our government, it may well be that the Establishment Clause should be enforceable at the demand of every individual who claims injury to an interest protected thereby. Justice Brennan, for one, has expressly rejected the suggestion that the Establishment Clause "is not one of the provisions of the Bill of Rights which in terms protects a 'freedom' of the individual. . . . The fallacy in this contention," he wrote, "is that it underestimates the role of the Establishment Clause, as a co-guarantor, with the Free Exercise Clause, of religious liberty." [83]

IV. Conclusion

One of the central purposes of judicial review is to restrain overreaching majorities from violating the rights

81. *See* Flast v. Cohen, 392 U. S. at 114 (Stewart, J., concurring).

82. *Id.* at 129 n. 18 (Harlan, J., dissenting). Justice Harlan's major difficulty with the argument was that it might be extended to certain other provisions of the constitution—*e.g.*, the Ninth and Tenth Amendments. "[A]ny doctrine of standing premised upon the generality or relative importance of a constitutional command would, [he thought], very substantially increase the number of situations in which individualized citizens could present for adjudication 'generalized grievances' about the conduct of government." He conceded that these Amendments, however, may be merely "tub[s] for the whale." And he praised such a doctrine of standing for "at least be[ing] internally consistent." *Id.*

83. Abington School Dist. v. Schempp, 374 U. S. 203, 256 (1963) (Brennan, J., concurring).

of individuals that the Constitution was designed to protect. Yet, under the defendants' view, Congress could transfer to a particular religious organization such national facilities as the Naval Observatory or the Army War College, secure in the knowledge that any individual citizen attempting to challenge such action as an abridgement of his or her rights under the Establishment Clause would not even be granted standing to make the claim. As Chief Justice Marshall wrote long ago in *Marbury v. Madison*, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." [84] The constitutional "injury in fact" complained of by the plaintiffs here gives them a sufficient "personal stake in the outcome" to assure a complete perspective of the issues involved. And we are convinced that the interest which the plaintiffs assert and seek to safeguard here is within the zone of interests protected by the Establishment Clause.

Accordingly, the judgment of the district court dismissing the complaint for lack of standing will be reversed, and the case remanded for proceedings consistent with this opinion.

ROSENN, *Circuit Judge*, Concurring.

I agree with Judge Adams' analysis that Americans United for Separation of Church and State, Inc., (Americans United) has standing under the Establishment Clause to challenge the transfer of surplus government property to a religious organization. I write separately, however, because I believe there is an additional reason which requires that we find standing. Simply stated, I believe that the plaintiffs have standing because they possess the

84. 5 U. S. 87, 102, 1 Cranch 137, 161 (1803).

necessary adversity of interest and, as a practical matter, no one is better suited to bring this lawsuit and thus vindicate the freedoms embodied in the Establishment Clause.

The Establishment Clause, and the first amendment of which it is a part, operates to protect the rights of political minorities against abuses by political majorities. *See* J. Madison, *Memorial and Remonstrance against Religious Assessments.* Thus, the first amendment, with its protections of fundamental rights, must be enforceable by the judicial branch of government, for it is by its very nature and terms designed to protect against possible abuse by the political branch. *See West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 638 (1943).

The first amendment is different from some provisions of the Constitution which do not depend primarily upon judicial enforcement for their efficacy and where alleged violations thereof thus do not give rise to a judicially cognizable controversy. *See Schlesinger v. Reservists Committee to Stop the War*, 418 U. S. 208 (1974); *United States v. Richardson*, 418 U. S. 166 (1974).[1]

The first amendment, however, is unlike the constitutional provisions at issue in *Richardson* and *Schlesinger.*

1. In *Richardson* the Supreme Court held that the plaintiff lacked standing to bring an action seeking to enforce the provisions of Article I, § 9, cl. 7 of the Constitution. The Court stated: "It is therefore open to serious question whether the Framers of the Constitution ever imagined that general directions to the Congress or the Executive would be subject to enforcement by an individual citizen." 418 U. S. at 178 n. 11. Furthermore, the Court noted that even if a judicial remedy were unavailable, the plaintiff might still obtain relief at the polls, through the operation of the electoral process. *Id.* at 179. Similarly, the Court observed in *Schlesinger* that "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." 418 U. S. at 227.

There is no doubt that it is "subject to enforcement by an individual citizen." *See United States v. Richardson, supra,* 418 U. S. at 178 n. 11. Furthermore, because the first amendment is designed to protect against abuses by political majorities, it need not, and indeed must not, depend upon the political process for vindication and protection.

The fundamental nature of first amendment interests and their nonmajoritarian nature is reflected in the liberalized standing rules that have been applied to overbreadth challenges under the Free Speech Clause. Within certain constraints, one whose conduct may be permissibly regulated or proscribed may, nevertheless, assert that the statute is unconstitutionally overbroad with respect to third parties not before the court. *See Broadrick v. Oklahoma,* 413 U. S. 601 (1973). If standing were not allowed in such cases, important rights of free speech would be rendered unenforceable. The existence of an overbroad statute may deter parties not before the court from engaging in constitutionally protected conduct. That very deterrence or chilling effect might well prevent a judicially cognizable controversy from arising, thus effectively shielding the statute from review. The more effectively a statute deterred protected activity, the more likely it would be to escape judicial review. The Free Speech Clause would thereby be severely weakened.

The scope of the liberalized standing rules in the free speech area is, I suggest, governed in part by the Court's realization of the need for an available plaintiff. When an individual has himself been charged with a violation of a statute, the Court is willing to allow him to challenge it, even though his conduct is permissibly regulable, because of the Court's concern that it will not otherwise have an opportunity to examine the challenged statute. *See Broadrick v. Oklahoma, supra,* 413 U. S. at 612. The indi-

vidual charged under the statute has an obvious interest in demonstrating its validity. This assures the requisite adversity necessary for judical decisionmaking.

Statutes alleged to violate the Free Speech or Free Exercise Clauses are likely to have a perceptible impact or focus upon individual conduct. Thus, even though all citizens may be said to have a generalized interest in free speech or free exercise values, that is insufficient to confer standing. There is normally an available class of likely plaintiffs better situated to challenge the offending statute. Similarly, statutes allegedly violative of the Establishment Clause may also be directed at the regulation of individual conduct. In *Abington School District v. Schempp*, 374 U. S. 205 (1963), for example, a state statute required the reading of Bible passages to public school students. There, students and their parents brought suit, challenging the statute under the Establishment Clause. The Court found that the children and their parents were directly affected by the statute and thus had standing to complain. 374 U. S. at 224 n. 9.

Unlike statutes allegedly violative of the Free Exercise and Free Speech Clauses statutes alleged to violate the Establishment Clause may not have an individual impact sufficient to confer standing in the traditional sense. Rather, such statutes may have the more general effect or purpose of aiding religion. In such circumstances, there is not an available class of likely plaintiffs whose conduct has been or will be circumscribed by the existence of the offending statute and who will thus have standing to seek judicial review. In *Flast v. Cohen*, 392 U. S. 83 (1968), however, the Supreme Court largely filled this gap by granting taxpayer standing to those challenging actions under the taxing and spending clause of the Constitution which are alleged to violate the Establishment Clause.

In the case before us, we are presented with a statute that does not arise under the taxing and spending power. Thus, I agree that there is not taxpayer standing. Furthermore, the statute at issue here is not directed at the regulation of individual conduct. Although it is possible to conceive of economic interets that might give rise to a plaintiff who meets traditional standing requirements, that will be relatively rare and is certainly not the case here.[2] Americans United is likely to be the best available plaintiff. If they do not have standing, it is probable that the transfer of property at issue here, and other similar transfers (of which there are apparently a substantial number, maj. op. at A2) would be placed beyond judicial review. In respect to such actions, the Establishment Clause would be rendered virtually unenforceable.

It is apparent that Americans United and those four of its directors named as individual plaintiffs, possess the requisite adversity of interest necessary to insure legitimate and effective judicial decisionmaking. Americans United is a non-profit organization some 90,000 strong with a historic and documented commitment to vindication of Establishment Clause interests. As stated by its Articles of Incorporation, Americans United's purpose is

2. Judge Adams observes that:

> In the present appeal, for instance, it might well be argued that Americans United is not as "good" a plaintiff as would be a nonsectarian educational institution that had actually applied for the award of government property in question, but lost out to the Valley Forge Christian College. Yet the fact that such an organization might make a "better plaintiff" cannot justify a denial of standing to Americans United. . . .

Maj. op. at A25. I agree. I would however further observe that the record contains no indication that there was any applicant other than the appellee competing for the transfer of the property. Nor do I believe that there ordinarily will be such a "better" plaintiff.

"to defend, maintain and promote religious liberty and the constitutional principle of the separation of church and state." Organizational purpose is, by itself, normally an insufficient basis on which to rest standing. *See Sierra Club v. Morton*, 405 U. S. 727, 739 (1972). Nevertheless, in the context of the case before us, and the need to provide a judicial forum for the vindication of Establishment Clause interests, I believe that it provides an additional indication that Americans United and the individual plaintiffs meet applicable standing requirements. Accordingly, I join Judge Adams in reversing the judgment of the district court.

WEIS, *Circuit Judge*, dissenting.

The majority concedes, and I agree, that the plaintiffs do not have taxpayer standing. I also agree that the rules of standing are at best far from clear. Nevertheless, it seems to me that the grant of standing to the plaintiffs runs contra to the Supreme Court's pronouncements in this complex area of the law.

Although the Court has expanded the categories of assertible injuries to include such matters as aesthetic and environmental well-being, *United States v. Students Challenging Regulatory Agency Proceedings (SCRAP)*, 412 U. S. 669, 686-87 (1973), it has not abandoned its insistence upon the presence of "injury in fact," *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 72-74 (1978). This factor has been said to be based on the necessity that the plaintiff have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." *Baker v. Carr*, 369 U. S. 186, 204 (1962). It has also been held at various times that injury in fact is a necessary predicate to the

Article III requirement of case or controversy. Both reasons have been subjected to critical commentary.[1]

Analysis of the raison d'etre of the injury in fact prerequisite may be interesting, but it does not provide much enlightenment in resolving standing questions. No general definition of injury in fact has been particularly conclusive, with such descriptions as "specific," "concrete," and "personal" having found their way into opinions. The cases depend to a very large extent upon their factual backgrounds, furnishing but little effective guidance for future determinations.

Out of the morass that is the American law of standing, however, several principles emerge. First, a generalized grievance brought by concerned citizens seeking to enforce a particular constitutional guarantee has been deemed too abstract to satisfy the injury in fact component of standing. *Schlesinger v. Reservists Committee to Stop the War*, 418 U. S. 208 (1974); *United States v. Richardson*, 418 U. S. 166 (1974). Second, a taxpayer's standing to promote constitutional governance has been confined to situations where a specific limitation on the congressional taxing and spending power has been alleged. This narrow opening to standing was expounded in *Flast v. Cohen*, 392 U. S. 83 (1968), where a taxpayer was granted standing to challenge an expenditure of federal funds for sectarian schools on the premise that the establishment clause is a limitation on Congress's power over the fisc. But in *United States v. Richardson, supra*, the Court rejected an attempt to expand taxpayer standing

1. *See, e.g.*, Bogen, Standing Up For *Flast:* Taxpayer and Citizen Standing to Raise Constitutional Issues, 67 Ky. L. J. 147 (1978); Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601 (1968). *See also* United States Parole Commission v. Geraghty, — U. S. —, —, 48 U. S. L. W. 4296, 4302 (U. S. March 19, 1980) (Powell, J., dissenting).

to reach disputes over issues other than the taxing and spending power because of a lack of any causal connection between plaintiff's status and the asserted injurious conduct.

In the case at bench, the majority essentially finds a different kind of "citizen standing" derived from "a shared individuated right to a government that 'shall make no law respecting the establishment of religion.'" Manuscript at 17. Although there is respected scholarly commentary approving that approach, it does not find support in the United States Reports.

In *Flast v. Cohen, supra,* Justice Fortas, in a concurrence, floated the idea that "[p]erhaps the vital interest of a citizen in the establishment issue, without reference to his taxpayer's status, would be acceptable as a basis for this challenge." 392 U. S. at 115-16. It is obvious that there were not enough votes approving this concept, for otherwise the majority would not have found it necessary to construct the complicated and detailed formula it used to bypass the venerable prohibition against taxpayer standing. Certainly, the opinion would have been simpler had a majority of the Court approved the Fortas concept.

It does not suffice to say that the *Flast* Court was limited by the plaintiffs' pleadings to a consideration only of the taxpayer issue. In the three-judge district court, Judge Frankel, in dissent, urged that the plaintiffs be given standing, not because they alleged that their tax dollars were being distributed unconstitutionally, but because they were asserting violations of the establishment clause—the same argument made by the majority here. *See Flast v. Gardner,* 271 F. Supp. 1, 11-13 (S. D. N. Y. 1967). In their brief filed with the Supreme Court, moreover, the *Flast* plaintiffs disclaimed that their principal motive was to keep taxes down. They sued, in their words,

> "to prevent a pocketbook injury but only because that is part of what they deem a much graver injury, an injury to the right to live under a government which separates itself strictly from the church and church affairs."

Brief for Appellant at 37.

> The briefs of several amici reflect the same approach:
>
> "[T]he rights advanced here are not primarily monetary in nature. . . . [T]he dominant inducement for this action is the protection of individual and social freedom. . . ."

Brief for National Council of Churches at 9.

> "Thus, as Judge Frankel suggested, an economic analysis of the plaintiff's interest is inappropriate in a case of this kind. *Ibid.* The proper analysis must comprehend the nature of the rights confirmed by the Establishment Clause, and the identity of the party upon whom these rights are conferred. . . . [T]he plaintiffs in this case, as citizens, contend that the Elementary and Secondary Education Act infringes the rights conferred upon them by the First Amendment. Their status as injured citizens, and nothing else, gives them the requisite interest to maintain their suit."

Brief for Americans for Public Schools at 8. It cannot be said, therefore, that the Supreme Court was not strongly urged to adopt the theory that the majority here now advances.

If as the majority suggests, however, the *Flast* Court felt itself bound by the pleadings, then that same limitation must necessarily apply to us as well. The amended complaint, upon which the district court reached its deci-

sion, identifies the plaintiffs as "taxpayers." The corporate plaintiff is described as an organization of taxpayers, and each individual is listed as a taxpayer who "would be deprived of the fair and constitutional use of his (her) tax dollar for constitutional purposes in violation of his (her) rights under the First Amendment . . ." (App. 9.)

The *Flast* complaint also identified the plaintiffs as taxpayers and protested the use of federal funds to finance instruction in sectarian schools. Thus, there is no substantial difference between the two complaints, certainly none that would permit consideration of citizen standing in one case and not in the other.

The plaintiffs do not allege any direct injury that the transfer of the property has inflicted upon them or any direct benefit that will accrue to them as a result of the requested judicial action. Their freedom of religion is not alleged to be affected in any respect. Rather, the complaint alleges that the granting of the property is a violation of the establishment clause and asks that the conveyance be declared void or that the college be required to return the property to the government. Neither of these actions would directly affect any of the plaintiffs.

The lack of cognizable injury to the plaintiffs places them in the same posture as those in *Schlesinger v. Reservists Committee to Stop the War, supra.* There, the Court reiterated the requirement that the party seeking review must himself have suffered an injury and said: "Abstract injury is not enough." *Id.* at 219, *quoting O'Shea v. Littleton,* 414 U. S. 488, 494 (1974). That holding was made in the face of a complaint that sought to force members of Congress to act in conformity with the incompatibility clause—"an interest shared by all citizens." *Id.* at 217. "[T]hat claimed nonobservance, standing alone, would adversely affect only the generalized interest

of all citizens in constitutional governance, and that is an abstract injury." *Id.* (footnote omitted).

Similarly, in *United States v. Richardson, supra,* the Court repeated the necessity for the plaintiffs' allegations of "particular concrete injury as a result of the operation of this statute," *id.* at 177, the statute in question being one authorizing private accounting by the Central Intelligence Agency. In that case the Court took pains to dispel the notion that standing should be conferred simply because if the plaintiff could not litigate the issue, no one could. *Id.* at 179. As the *Richardson* majority observed, such a situation supports the argument that the issue is one "committed to the surveillance of Congress, and ultimately to the political process." *Id.*

I, for one, am unwilling to believe that Congress, responsive as it is to public opinion, is likely to give away either the Naval Observatory or the Army War College.[2] To my mind, the *Schlesinger* and *Richardson* observations apply just as clearly to the generalized complaints of the plaintiffs here. Accordingly, I can find no principled basis for distinguishing the cases.

In light of this authority, I do not find persuasive the argument that the establishment clause creates a right capable of being enforced by all citizens. As Justice Harlan indicated in his *Flast* dissent, premising standing on a hierarchical view of constitutional commands would increase, without any logical basis, "the number of situations in which individual citizens could present for adjudication 'generalized grievances about the conduct of

2. The Valley Forge hospital was originally constructed in 1942 to treat wounded servicemen during World War II. As one real estate appraiser wrote, "[T]hese buildings were constructed several years ago for one purpose only, that is for an army hospital, and it is my feeling that they have little or no use, generally speaking, for other purposes." (App. 242.)

government.'" 392 U. S. at 129-30 n. 18, *quoting id.* at 106 (majority opinion). Nor do other cases relied on by the majority support its position. Both *Abington School District v. Schempp*, 374 U. S. 203 (1963), and *Baker v. Carr, supra*, are readily distinguished because the plaintiffs there suffered particularized injuries. In *Schempp*, the parents and their children were directly affected by the presence of classroom prayer. And in *Baker*, the harm alleged was the devaluation of plaintiffs' individual votes. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3.19, at 86-87 (1978).

The majority has embraced a concept of standing presented to the Court in 1968 and not accepted by it at that time, or since. If the basic principles of standing prove to be unworkable or undesirable, then it is the Supreme Court and not a court of appeals that has the right to change them. *See Hicks v. Miranda*, 422 U. S. 332, 343-45 (1975). I find no indication in *Reservists* and *Richardson* that the Court has gone beyond what *Flast* contained, and I would therefore affirm the district court.

Order of the United States District Court for the Eastern District of Pennsylvania, Americans United For Separation of Church and State, Inc., Andrew Leigh Gunn, Edward E. Doerr, Gioele Settembrini, and E. Mallary Bins, Plaintiffs v. The United States Department of Health, Education and Welfare, The United States of America, and Valley Forge Christian College, Defendants, Civil Action No. 77-1321, Filed December 15, 1978.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 77-1321

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC. ANDREW LEIGH GUNN, EDWARD E. DOERR, GIOELE SETTEMBRINI, AND E. MALLARY BINNS,

Plaintiffs

v.

THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE THE UNITED STATES OF AMERICA, AND VALLEY FORGE CHRISTIAN COLLEGE,

Defendants

ORDER

AND Now, this 15th day of December, 1978, after consideration of the arguments and briefs of counsel, the

motions of defendant Department of Health, Education and Welfare to dismiss the complaint and of defendant Valley Forge Christian College for summary judgment are granted for the reason that plaintiffs lack standing to maintain this action.

1. The only basis advanced by the individual plaintiffs in support of their claim to standing is their status as taxpayers; the only basis advanced by the organizational plaintiff in support of its claim to standing is the status of its members as taxpayers;

2. It is well established that in order to achieve taxpayer standing, plaintiffs' cause of action must be a challenge to a Congressional exercise of the taxing and spending power, U. S. Const. Art. I, § 8. *Flast v. Cohen*, 392 U. S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968).

3. Plaintiffs challenge is to a transfer of property pursuant to the Federal Property and Administrative Services Act of 1949, 40 U. S. C. § 471 et seq.

4. A transfer of property pursuant to the Federal Property and Administrative Services Act is an exercise of Congressional property power, U. S. Const., Art. IV, § 3, cl. 2; see *United States v. Cassiagnol*, 420 F. 2d 868, 876 (4th Cir.), cert. denied, 397 U. S. 1044, 90 S. Ct. 1364 (1970); *Kern Copters, Inc. v. Allied Helicopter Service, Inc.*, 277 F. 2d 308, 313 (9th Cir. 1960).

5. Since plaintiffs do not challenge an exercise of Congressional taxing and spending power, they lack standing to maintain this action; *Flast v. Cohen*, supra; *Mease v. Heinz*, No. 78-1106 (E. D. Pa. Oct. , 1978).

6. Plaintiffs have also failed to allege that they have suffered any actual or concrete injury beyond a generalized grievance common to all taxpayers; for this reason

also, plaintiffs lack standing to bring this action; see *Schlesinger v. Reservists Committee to Stop the War*, 418 U. S. 208, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1975); *Mease v. Heinz*, supra.

By THE COURT:

J. WILLIAM DITTER, JR.,
J.

12/15/78
Copy TO:
J. T. Action, Esq.
R. S. Forster, Esq. (Asst. U. S. Atty.)
Ball & Skelly
C. C. Hodgson, Esq.

Judgment of the United States Court of Appeals for the Third Circuit, Americans United for Separation of Church and State, Inc., Gunn, Andrew, Leight, Doerr, Edward D., Settembrini, Gioele, Binns, E. Mallary, Appellants v. The United States Department of Health, Education and Welfare, The United States of America, Northeast Bible College, a/k/a Valley Forge Christian College, No. 79-1221, Dated April 8, 1980.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1221

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC., GUNN, ANDREW, LEIGH, DOERR, EDWARD D., SETTEMBRINI, GIOELE, BINNS, E. MALLARY,

Appellants

v.

THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION and WELFARE, THE UNITED STATES OF AMERICA, NORTHEAST BIBLE COLLEGE, A/K/A VALLEY FORGE CHRISTIAN COLLEGE

(D. C. Civil Action No. 77-1321)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ADAMS, ROSENN and WEIS, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on October 12, 1979 and reassigned February 7, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed December 15, 1978, be, and the same is hereby reversed and the cause remanded for further proceedings consistent with the opinion of this Court. Costs taxed against appellees.

ATTEST:

/s/ THOMAS F. QUINN
Clerk

April 8, 1980

Order Denying Petition for Rehearing En Banc of the United States Court of Appeals for the Third Circuit, Americans United for Separation of Church and State, Inc., et al, Appellants v. The United States Department of Health, Education and Welfare, et al. No. 79-1221, Dated June 3, 1980.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1221

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC., et al,
Appellants

v.

THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, et al.

SUR PETITION FOR REHEARING EN BANC

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges.*

The petition for rehearing filed by Appellee, Valley Forge Christian College, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit

judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ ARLIN M. ADAMS,
Circuit Judge

Dated: June 3, 1980

United States Constitution, Relevant Articles and Amendments.

ARTICLE I, SECTION 8, CLAUSE 1

The Congress shall have Power

To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; . . .

ARTICLE III, SECTION 2, CLAUSE 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State; between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. . . .

ARTICLE IV, SECTION 3, CLAUSE 2

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Federal Property and Administrative Services Act of 1949, 40 U. S. C. § 471 et seq. (1970), Relevant Provisions.

40 U. S. C. § 484. Disposal of surplus property—Supervision and direction

(a) Except as otherwise provided in this section, the Administrator shall have supervision and direction over the disposition of surplus property. Such property shall be disposed of to such extent, at such time, in such areas, by such agencies, at such terms and conditions, and in such manner, as may be prescribed in or pursuant to this Act. . . .

(k)(1) Under such regulations as he may prescribe, the Administrator is authorized, in his discretion, to assign to the Secretary of Health, Education, and Welfare for disposal such surplus real property, including buildings, fixtures, and equipment situated thereon, as is recommended by the Secretary of Health, Education, and Welfare as being needed for school, classroom, or other educational use, or for use in the protection of public health, including research.

(A) Subject to the disapproval of the Administrator within thirty days after notice to him by the Secretary of Health, Education, and Welfare of a proposed transfer of property for school, classroom, or other educational use, the Secretary of Health, Education, and Welfare, through such officers or em-

ployees of the Department of Health, Education, and Welfare as he may designate, may sell or lease such real property, including buildings, fixtures, and equipment situated thereon, for educational purposes to the States and their political subdivisions and instrumentalities, and tax-supported educational institutions, and to other nonprofit educational institutions which have been held exempt from taxation under section 101(6) of Title 26. . . .

(C) In fixing the sale or lease value of property to be disposed of under subparagraph (A) and subparagraph (B) of this paragraph, the Secretary of Health, Education, and Welfare shall take into consideration any benefit which has accrued or may accrue to the United States from the use of such property by any such State, political subdivision, instrumentality, or institution. . . .